PEMBANGUNAN JENTERA PERINDUSTRIAN SDN. BHD.

v.

MARIA PRAGASAM MUNICUM

HIGH COURT MALAYA, SHAH ALAM
MAHADEV SHANKAR J
[CIVIL APPEAL NO. 11-2-90]
7 MAY 1990

CIVIL PROCEDURE**:** *Notes of proceedings - Third party notice - Case fixed for final disposal a year later - Main suit adjourned - Issue - Whether defendant and third party need to join issues for the requisite pleadings - Discretion of Magistrate - Order 12 rr. 1, 2, 2(2)(c), O. 16 r. 4 Rules of the High Court 1980.*

On 28 May 1987 the plaintiffs initiated these proceedings by filing their summons and statement of claim. The defence was filed on 9 July 1987.

The case was set down for hearing on 24 November 1987. On that day the defendant's solicitors made a verbal application to file third party notice and by consent the suit was adjourned to 31 December 1987 for mention.

The defendant failed to file a statement of claim on the third party and the latter to plead it within a specified period of days.

The third party filed a defence and counterclaim on 20 June 1988 treating the third party notice as a statement of claim. It was served on the defendants solicitors on 21 June 1988.

In response to this the defendant's solicitors did nothing. On the day of hearing on 24 May 1989 solicitors for all parties were present. The third party's solicitors applied for judgment on the counterclaim in default of the defendant's reply and defence to the counterclaim.

Held:

[1] The learned Magistrate was in reality exercising his discretion in refusing to permit the defendant to file a defence to the counterclaim thereby forcing a further adjournment to the case.

[2] The only issue is whether that discretion was properly exercised. The grounds of judgment show that the reasons given by the defence did not find favour with the learned Magistrate. The decision cannot be interfered with because it has not been shown that the discretion was improperly exercised.

[3] In the light of the omission of the defendant to obtain proper directions as to the requisite pleadings, it is the opinion of this Court that the defendant should have filed and served his reply and defence to the counterclaim within seven days of the service thereof, or extended time as the Court may have allowed. This they did not do and the learned Magistrate thought that an application on the trial was too late.

[4] Order 12 r. 3(3) empowers applications to set aside default judgment on terms. The defendant should have applied under the rule instead of appealing. A very relevant consideration to such applications is strong evidence to show firstly a good excuse for lapse and secondly a meritorious defence. Those are eminently matters for the Court of first instance which gave the default judgment.

[Appeal dismissed.]

Case referred to:
Pak Hoong Tractor and Building Construction v. Syarikat Pasar Perdana [1982] 1 MLJ 77 ***(cit)***

Legislation referred to:
Rules of High Court 1980, O. 16 r. 4 and Form 26
Subordinate Courts Rules 1980, O. 12 r. 3(2), (3)

For the appellant - Mohan Ghandi; M/s. Mohan Ghandi & Associates
For the respondent - Rafie; M/s. Rafie Mohd. Shafie & Associates

JUDGMENT

Mahadev Shankar J:

On 28 May 1987 the plaintiff initiated these proceedings by filing their summons and statement of claim for unpaid insurance premiums.

The defence was filed on 9 July 1987. The case was set down for hearing on 24 November 1987.

On that day the defendant's solicitor made a verbal application to file a third party notice and by consent the case was adjourned to 31 December 1987 for mention.

Third party proceedings are governed by O. 12 of the Subordinate Court Rules 1980 (the Rules). Order 1 r. 4 says that where no procedure is laid down, the Rules of the High Court, as nearly as may be, shall be followed and adopted. It is usual in the High Court to issue third party notices without leave **before** service of the defence, or with leave within a reasonable time thereafter.

In the present case notice of intention to bring in the third party was given on the date fixed for hearing and the main suit had to be adjourned.

By O. 12 rr. 1 and 2 of the Rules the defendant could only issue his third party notice after filing his defence and with leave of the Court.

This application was filed on 18 December 1987 and heard on 3 December 1987. An order in terms was made and the case fixed for mention again on 13 March 1988.

This must have been done pursuant to O. 12 r. 2(2)(c) of the Rules which reads:

> 2(2)(c) the Court must fix a return day for the further hearing of the summons and may give such directions and make such orders for the further conduct of the proceedings.

The conduct of the third party proceedings was in the hands of the defendant. On 13 May 1988, in the presence of Counsel for all parties concerned, the case was fixed for hearing a year later on 24 May 1989.

I would pause here to observe specifically that the notes of evidence do not make it clear what other directions or orders, if any, were given on the return day of the third party notice for the further conduct of the proceedings. But from the fact that the case was fixed that day for final disposal on 24 May 1989, it must have been manifestly obvious to the defendant and the third party that the issues between them had to be joined by the requisite pleadings.

This is usually done by third party directions *vide* O. 16 r. 4 and Form 26 of the Rules of the High Court 1980. The directions usually require the defendant to file a statement of claim on the third party and the latter to plead to it within a specified period of days.

In the absence of any such express directions the third party filed a defence and counterclaim on 20 June 1988 treating the third party notice as a statement of claim. It was served on the defendant's solicitors on 21 June 1988.

In response to this the defendant's solicitors did nothing. When the case came on for hearing on 24 May 1989 solicitors for all Counsel were present. Third party's solicitor applied for judgment on the counterclaim in default of the defendant's reply and defence to the counterclaim.

Defence Counsel's response to this application was to state that he had only got a copy of the defence, and had taken over the case. He had just received this and applied orally for leave to file a defence to the counterclaim.

This application was refused and the learned Magistrate gave judgment to the third party **in default** of a defence to the counterclaim.

Against this decision the defendant appealed.

Before me Counsel for the third party took a preliminary objection that this appeal is misconceived. He relied on Seremban High Court Civil Appeal No. 12-1-88 between *United Malayan Banking Corp. Bhd. v. Loh Goh Seng & Ors.* [unreported] and *Pak Hoong Tractor and Building Construction v. Syarikat Pasar Perdana* [1982] 1 MLJ 77. The effect of these decisions is that the initial remedy against a default judgment is not to appeal but to apply to have the judgment set aside.

Appellant's Counsel contended that since the case was for hearing and his application for leave to file a defence to the counterclaim had been dismissed he had to appeal. He submits that to have filed an application to set aside the judgment would have been an attempt to have "a second bite at the cherry" which was not permissible.

With respect I am afraid I do not agree. The learned Magistrate was in reality exercising his discretion in refusing to permit the defendant to file a defence to the counterclaim thereby forcing a further adjournment of the case.

The only issue therefore is whether that discretion was properly exercised. The grounds of judgment show that the reasons given by the defence Counsel did not find favour with the learned Magistrate. I am afraid I cannot interfere with his decision because it has not been shown that his discretion was improperly exercised. Whilst Counsel may have just taken over the case the defence solicitors were on record from the inception and had more than a year to put the record straight. Furthermore this was not a matter where the third party's solicitors had stolen a march on the defendants by not giving notice. Both parties knew the case was for hearing and defence Counsel had come there unprepared to go on.

Counsel for both parties in this appeal seem to have totally lost sight of O. 12 of the Rules. O. 12 r. 3(2) and (3) had specific reference to this case.

In the light of the omission of the defendant to obtain proper directions as to the requisite pleadings on 13 May 1988 it is the opinion of this Court that the defendant should have filed and served his reply and defence to the counterclaim within seven days of the service thereof (see O. 14 r. 10(3) of the Rules) or such extended time as the Court may have allowed.

This they did not do and the learned Magistrate thought that an application on the trial date was too late.

Order 12 r. 3(3) empowers applications to set aside default judgments on terms. The defendant should have applied under that rule instead of appealing. A very relevant consideration to such applications is strong evidence to show firstly a good excuse for the lapse, and secondly a meritorious defence. Those are eminently matters for the Court of first instance which gave that default judgment.

It is for these reasons that I dismissed this appeal because it is manifestly misconceived.

The appellant will pay the costs of this appeal as taxed by a proper officer of this Court. For the avoidance of doubt I would state that such costs should not include the costs incidental to and arising out of the affidavit of respondent's Counsel deposed to on 29 March 1990 and 17 April 1990 and filed herein or the appellants' summons in chambers filed on 3 April 1990 and the affidavit of the appellant's Counsel in support thereto, as to which I make no order.

Also found at [1992] 1 CLJ 473